the
Greater
Newark
urban coalition, inc.

MEMORANDUM

TO: All Concerned/New Jersey Affirmative Action Programs

FROM: Gustav Heningburg, President Greater Newark Urban Coalition &
Chairman, Greater Newark Affirmative Action Committee

DATE: December 2, 1976

On November 30, 1976 the Supreme Court of New Jersey rendered a decision in the case of Charles S. Lige and Gilbert H. Francis, formerly director of the New Jersey Division on Civil Rights. The decision was in response to a complaint filed by Lige against the Town of Montclair charging racial discrimination against him in his efforts to be hired as Montclair fireman. The New Jersey Division on Civil Rights investigated the complaint, and found a reasonable basis for the charges of discrimination against Lige and others. Subsequently the Division on Civil Rights ordered a remedy which included the stipulation that the Montclair Fire Department hire one qualified minority applicant for each qualified white applicant until the total number of minority officers on the Fire Department equals at least fifteen persons. In addition, the order required that one qualified black applicant shall be promoted for every one qualified white applicant in the Montclair Police Department until 50% of those minority applicants deemed qualified under new testing procedures have been promoted.

The Town of Montclair appealed the order, specifically challenging the quotas mentioned above. The New Jersey Supreme Court ruled, in effect, that the remedial provisions (the establishment of quotas in this instance) violate Article I, Paragrap 5 of the New Jersey Constitution and "exceed the power entrusted to the Director of the Division on Civil Rights".

The purpose of this memorandum is to share what we believe the effects of this ruling by the New Jersey Supreme Court will be on the "Newark Plan" which was developed more than five years ago to correct the historic patterns of discrimination and exclusion of blacks from job opportunities in the construction industry as identified in the public hearings held in Newark in 1971 by the Office of Federal Contract Compliance (OFCC). This Plan, and its subsequent implementation in Newark and surrounding areas in the construction of the New Jersey College of Medicine and

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Dentistry, Newark International Airport, Essex County Community College, the Meadowlands Racetrack and Football Field, the expansion of the Newark campus of Rutgers University, and all tax-abated construction in the City of Newark has been hailed by contractors, unions, community and business leaders and New Jersey state officials as perhaps the most effective construction affirmative action program in America. It has resulted in the earning of wages in excess of $47 million dollars by minority workers during the past five years.

One of the key elements contributing to the success of this Plan has been the implementation of goals and timetables (referred to as quotas by some). The experience of those involved in the development of the Newark Plan, and experience all over America in attempting to resolve the problem of exclusion of minorities from the construction industry makes it clear that this problem cannot be successfully addressed without the incorporation of goals and timetables against which progress can be measured. The Supreme Court decision, which appears to outlaws quotas, has been interpreted by many as potentially having the effect of destroying the viability of the Newark Plan.

After consultation with legal counsel and others who have been deeply involved in the creation and implementation of the Newark Plan, and after a careful review of the Supreme Court decision, including the dissent by Justice Pashman, we have reached the following conclusions about the possible implications for the Newark Plan. The Court has issued a very narrow decision, strictly related to the specific issues and circumstances of the Lige vs. Montclair case. Their ruling concerning the use of quotas to remedy the past effects of discrimination cannot be automatically applied to other situations where quotas or goals are being utilized as they are in the Newark Plan, or in Executive Order 14 issued by Governor Brendan Byrne to assure representative employment opportunities for minorities and women in state agencies, or as they are utilized in federally approved "Hometown Plans" all over the country which grew out of federal Executive Order 11246 issued by President John F. Kennedy. I am certain however that those people who opposed affirmative action programs which include goals and timetables will interpret this decision as a basis for backing away from such efforts. It will also cause many agencies which have such programs to begin seeking new legal opinions as to the validity of their programs in light of the court decision. This step has already been taken by State Treasurer Richard Leone, who has sought a ruling from the State Attorney General concerning the impact of this decision on the state-wide affirmative action plan mandated by the New Jersey Legislature in 1975.

While it is our opinion that the inhibition against quotas imposed in this particular case cannot be applied to other affirmative action programs automatically, it does appear that it will severely inhibit the ability of the New Jersey Division on Civil Rights to fashion effective and affirmative remedies for past discrimination. The Supreme Court's inference that race is a "irrelavant" factor in employment practices in New Jersey is an unfortunate and terribly naive assumption. The record is clear and continuous that people of color in New Jersey have been systematically and continuously denied employment opportunities by governmental agencies and the private sector on the basis of race for many years. In the light of all this documented evidence, it is most distressing that the Court has chosen to take the position is an irrelevant factor. Even more distressing however, is the fact that while apparently eliminating the use of a remedy which has proven to be

successful in the past, they offer no viable alternative to deal with the continuing pervasive problem of racial discrimination. To suggest, as they did, that "co-equal education" for all citizens is a solution to this kind of problem is to fly into the face of the realities with which this very Court has wrestled over the past three years in their deliberations in the Robinson v. Cahill case on public education in New Jersey.

Our state Supreme Court has taken a position on hiring and promotion quotas as a remedy for past discrimination which has been taken by no other federal or state appellate in the nation despite the fact that federal courts and state courts have consistently approved quotas which were designed to remedy specific instances of past discrimination. Nine of the ten federal circuits have endorsed preferential hiring or promotion plans based upon decrees designed to meet particular situations.

The New Jersey Division on Civil Rights appears to be the major victim of the Supreme Court's decision as well as those aggrieved minority citizens who depend on that state agency for relief. It is already an under-staffed and under-funded agency, and adding the burden of having to react to this kind of decision will serve to further frustrate the efforts of that staff and of the citizens who look to it for relief. It is important to reemphasize however that the imposition on quotas growing out of this decision cannot be uniformly or automatically applied to any other affirmative action plans in which quotas or goals and timetables are utilized.

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